BOOK REVIEW

HELPING HAND: THE LIFE AND LEGACY OF LEARNED HAND

GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE, New York (1994) (680 pages and 105 pages of notes) ($35.00).

*Reviewed by John F. Wirenius**

Since the publication of Edmund Morris' scholarly, yet compellingly readable depiction of the youth and early career of Theodore Roosevelt,[1] biographical writing has seemingly entered a new era, one in which narrative sweep is as highly prized as exhaustive research, and in which accuracy manages to coexist with the aim of engaging the reader. The current trend in biography eschews hagiography, seeking to explore the character of the subject with the insight of a novelist wedded to sound scholarship. While not all recent biographies aspire to this high standard, the best do, and these have been unusually plentiful, ranging fields as diverse as science, literature, and politics.[2]

This wider boom in the biography industry has led to a corresponding boomlet in judicial biography. After decades of neglect, for example, Justice Oliver Wendell Holmes has been the subject of not one but three ambitious volumes since 1989.[3] Similarly, judges as diverse as William O. Douglas,[4] the first and second Jus-

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1 EDMUND MORRIS, THE RISE OF THEODORE ROOSEVELT (1979).

2 Recent examples include Michael Holroyd's four volume GEORGE BERNARD SHAW (THE SEARCH FOR LOVE (1988); THE PURSUIT OF POWER (1989); THE LURE OF FANTASY (1991) and THE LAST LAUGH (1993)); BLANCHE WIESEN COOK, ELEANOR ROOSEVELT (vol. 1, 1992); VICTORIA GLENDINNING, TROLLOPE: A VICTORIAN LIFE (1993); N. JOHN HALL, TROLLOPE: A BIOGRAPHY (1991); WILLIAM MANCHESTER, THE LAST LION: A LIFE OF WINSTON CHURCHILL (VISIONS OF GLORY (1983) and ALONE (1988)); ANNE SOMERSET, ELIZABETH I (1991).

3 In chronological order: SHELDON M. NOVICK, HONORABLE JUSTICE (1989); LIVA BAKER, THE JUSTICE FROM BEACON HILL (1991); and G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF (1993). *See also* GARY AICHELE, OLIVER WENDELL HOLMES, JR.: SOLDIER, SCHOLAR AND JUDGE (1989) (a less ambitious introduction to Holmes's life and thought).

4 JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS (1980) [hereinafter SIMON, INDEPENDENT JOURNEY].

tices John Marshall Harlan,[5] Thurgood Marshall[6] and Abe Fortas[7] have been the subject of full length volumes, of admittedly varying quality. Moreover, these volumes all adopt the contemporary approach to biography: to seek to bring the subject's character into focus through recounting his or her life story. By shedding the dry scholasticism which has pervaded much judicial biography[8] as well by refusing to create myths regarding the subject,[9] they frequently live up to the highest standards of both literature and of scholarship.[10]

In this propitious environment, Gerald Gunther, one of the nation's most respected constitutional scholars, has written the first full length biography of Learned Hand, easily the most admired and influential federal judge never to sit on the Supreme Court of the United States. Gunther, who has been working on this biography on and off since at least 1975,[11] served as Hand's clerk for the 1953-1954 term of court, when Hand was a senior (retired, or in Hand's case, semi-retired) judge of the Second Circuit Court of Appeals.[12] He writes of his former mentor with enormous affec-

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5 LOREN BETH, JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE (1992); TINSLEY E. YARBROUGH AND JOHN MARSHALL HARLAN: THE GREAT DISSENTER OF THE WARREN COURT (1992).

6 MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH (1992).

7 *See* BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE (1988).

8 *See, e.g.* Mark DeWolfe Howe's two volumes on Holmes, JUSTICE HOLMES: THE SHAPING YEARS 1641-1870 (1957) and JUSTICE HOLMES: THE PROVING YEARS 1870-1882 (1960). Each volume is chock-full of information and brimming with valuable exposition of Holmes's evolution as a thinker, but a soporific reading experience due to Howe's pedestrian prose style, and indifference toward narrative.

9 Holmes has also received this treatment, in Catherine Drinker Bowen's charming, but heavily fictionalized book YANKEE FROM OLYMPUS (1944). This occasionally filmed account of Holmes's life was sentimental, but oversimplified his life so agreeably that it succeeded in transforming the aristocratic Holmes into a folk hero. While most judicial biographies do not slide off the trail into whimsy, they tend to be reverential, almost like an extended eulogy for their subject. *See, e.g.*, MERLO J. PUSEY, CHARLES EVANS HUGHES (1951); SILAS BENT, JUSTICE OLIVER WENDELL HOLMES (1932); ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE (1946).

10 Holmes especially has been fortunate in his biographers; the two most recent, Baker and White, are especially admirable, and their works read especially well together. Where Baker excels in her depiction of Holmes's life off the bench and out of the legal arena, White presents his thought and its development with precision and clarity. *See, e.g.*, BAKER, *supra* note 3; WHITE, *supra* note 3.

11 Gunther attributes his perusal of Hand's papers to research for the instant biography. *See* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 719 (1975) [hereinafter Gunther, *Learned Hand and the Origins*].

12 GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE xviii (1994).

tion, although seeking to portray him "warts and all."[13]

Ironically, in view of Gunther's standing as a legal and constitutional scholar, he is most successful when exploring the private individual, his character and those of his friends and his enigmatic feminist wife Frances (his children, oddly, remain shadowy, peripheral figures). When evaluating Hand's contribution to jurisprudence, and setting forth his views on subjects ranging from freedom of speech to the proper role of the judiciary in a free society, Gunther's book presents a regrettably sanitized, misleading and incomplete depiction of the Judge's philosophy. Worse, he flinches away from the implications of Hand's philosophy, seeking to squeeze this most complex and ambiguous jurist into the mold of a conventional civil libertarian.

LEARNED HAND: THE MAN

Billings Learned Hand was born on January 27, 1872, the second and last child of Samuel and Lydia Hand.[14] Hand was the son of a rather successful appellate lawyer of a philosophical bent and considerable bibliomania and, as Gunther describes, an overprotective, "smothering" mother.[15] Gunther backs up these characterizations with ample instances, showing that Hand grew up with more than his share of diffidence, and in constant doubt of his own abilities.[16]

Hand's father's early death, when young "Bill" or "Bun" (as Hand was known throughout his life among his family and friends) was only fourteen years old, left him without a counterbalance to this maternal influence. Nevertheless, it also left an imposing exemplar.[17] No matter how far Hand progressed in his career, he would always compare himself intellectually and professionally to his father—almost always to his own disadvantage.[18] Ironically, both father and son shared some of the same traits, including a nervous disposition, a tendency toward melancholy, and a delight in the intellectual life.[19] Both also followed family tradition by entering the legal profession.[20]

Learned Hand was educated at Albany Academy (from 1879 to

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13 *Id.*
14 *Id.* at 3.
15 *Id.* at 5-9.
16 *Id.* at 10.
17 *Id.* at 22-23.
18 *Id.* at 7-9.
19 *Id.*
20 *Id.* at 13-15.

1889), and graduated from Harvard College in 1893.[21] At Harvard, he felt like an outsider, after failing to be elected to any of Harvard's prestigious clubs.[22] But it was at Harvard that he first became engaged as a student, responding to the "magnetic" teaching of George Santayana and to the skeptical William James, as well as to Josiah Royce, whose human qualities drew the young Hand more than his ideas, and Frank W. Taussig, who sparked his interest in economics.[23] Like Oliver Wendell Holmes before him, Hand contemplated a career in academia, teaching philosophy; again, like Holmes, Hand was "shoved into the law",[24] bowing to family pressure, primarily by his uncle, Richard Hand.[25]

At Harvard Law School, Hand found himself far more accepted than at the college. For one thing, law school "was more meritocratic."[26] For another, he and Fred Townsend, a more socially accepted friend from Harvard College, found a congenial group of law students with more intellectual interests than the norm. Although Hand was selected for the Law Review, and the then-prestigious Pow-Wow Club, which was essentially a moot court group, Hand nonetheless never became terribly active in either. In fact, he dropped the Law Review after working on only four issues, explaining his decision by stating that he had enrolled in the Law School "to get a legal education, not to edit or write parts of a magazine."[27]

Hand had a poor opinion of Christopher Columbus Langdell, the originator of the case method of legal instruction, who was then near the end of his long career.[28] He responded far more positively, in an eager fashion he later described as "more adolescent than most," to the less dogmatic faculty members, such as James Barr Ames, James Bradley Thayer, and John Chipman Gray.[29] Interestingly, Hand eschewed the logicians, Christopher Columbus Langdell and Samuel Williston, as firmly as he did the wholly practical, such as Jeremiah Smith.[30] Although Gunther does not make an overt point of it, this suggests that Hand was already forming his intensely idiosyncratic world view as a skeptic,

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21 *Id.* at 23-32.
22 *Id.* at 27-29.
23 *Id.* at 34-37.
24 HOLMES-LASKI LETTERS, 204-05 (Mark DeWolfe Howe ed., 1953).
25 GUNTHER, *supra* note 12, at 40-43.
26 *Id.* at 44.
27 *Id.*
28 *Id.* at 43, 46-47.
29 *Id.* at 47.
30 *Id.* at 47-48.

unable to easily accept any creed or ideology. Hand would never be the whole-hearted political partisan that Felix Frankfurter would be, although they would be allies in many struggles.

After law school, Hand eked out an unhappy existence practicing law in Albany, and later, in New York City. These years were perhaps the least happy of his life, blighted by the perpetual fear that he would fall behind, proving to be inadequate as a member of the profession in which his father had shone, even briefly sitting on the state's highest court.[31] After two years in Albany of his doomed striving toward professional success, Hand again began to pursue intellectual matters. Nominated by his cousin and close friend Augustus "Gus" Noble Hand, Hand became a member of the "no-name" club, a group of New York and Boston lawyers who met monthly to discuss issues of all kinds.[32]

In August 1901, Hand, already inspired by his life-long aversion to his home town of Albany,[33] was galvanized into renewed effort in seeking a position in New York City when he met and fell in love with Frances Fincke, the daughter of a wealthy lawyer.[34] Frances graduated from Bryn Mawr, where she studied under the intellectually rigorous, convention-despising Martha Carey Thomas.[35] Thomas so despised the conventional Victorian marriages that she once declared "Our failures only marry."[36] Educated in an unusually competitive atmosphere for Victorian females, the students of Bryn Mawr formed passionate friendships—so intense that, as Gunther states, their expressions of affection for each other "might arouse suspicions of lesbianism today."[37]

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31 *Id.* at 8.

32 *Id.* at 60.

33 *Id.* at 20.

34 *Id.* at 77.

35 *Id.* at 88-92.

36 *Id.* at 91.

37 *Id.* at 95-96. The hothouse intensity of relationships at Bryn Mawr in the late 19th Century as exhibited by Frances Fincke and Mildred Minturn is elsewhere well-documented. Mark Twain's daughter, Olivia Susan Clemens ("Susy" to her family, "Olivia" to her Bryn Mawr friends) wrote letters to her classmate Louise Brownwell of an even more intimate nature than those exchanged by Frances and Mildred. Susy Clemens's letters reflect an almost physical yearning, and are highly suggestive of sexual intimacy. OLIVIA S. CLEMENS, PAPA xxiii *et seq.* (C. Neider ed., 1987). Yet both Susy Clemens and Louise Brownwell went on to engage in romantic relationships with men.

Single sex education combined with residence has, of course, been claimed to have fostered same-sex intimacies on the part of those whose eventual sexual preference would prove to be for the opposite gender. With reference to the British Public school system, for example, John Mortimer (a Harrow graduate) describes himself at school as existing in "a chrysalis of vague schoolboy homosexuality" from which he

Gunther dismisses this prospect, but does describe the odd strain of possessiveness Frances displayed when her own closest friend, Mildred Minturn, flirted with marriage, and then married. As summarized by Gunther, the correspondence between the two sounds far more like that between two lovers, one seeking to change the terms of the relationship, and the other seeking to preserve an intimacy for the lack of any competing intimacy.[38] Whatever the nature of their relationship, both Mildred and Frances would strive to live up to their mentor Thomas's ideal. Mildred did this through bursts of hard work punctuated by bouts of "neurasthenia," the popular Victorian term for nervous exhaustion, and Frances through sporadic efforts to pursue the sort of rigorous self-educative reading that their mentor would have approved.[39]

Learned Hand met Frances Fincke while both were staying with different, although acquainted, friends at Murray Bay, ninety miles downriver from Quebec. Frances was staying with the Minturns, when Hand lay siege to the house in an effort to win her, with a persistence which is somewhat surprising from this diffident and self-doubting man. Frances was far from sure that she reciprocated Learned's feelings; after he proposed to her, she took over a year to accept his proposal. Indeed, after accepting him one evening, she later changed her mind, and summoned him to the Minturns' cottage, where she was again staying, to break off the hours-old engagement. When hearing him approach, "singing and whistling, obviously overjoyed by the success of his long courtship", Frances again changed her mind, unwilling to change his elation to disappointment.[40]

Hand's marriage was about his only solace in his first few years in New York, where he found himself repeatedly cast as the underappreciated junior partner.[41] Temperamentally unsuited for the

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only emerged at University. JOHN MORTIMER, CLINGING TO THE WRECKAGE 47 (1978). Frances Fincke and her Bryn Mawr compatriots may well fit this paradigm. However, the fact that the two women planned a "Boston Marriage," a post-graduation domestic arrangement common among Bryn Mawr graduates of the time, argues that the two had a significant commitment to each other. Interestingly, some of these "Boston Marriages" endured for years, including the arrangement between Martha Carey Thomas and her companion. GUNTHER, *supra* note 12, at 96.

38 GUNTHER, *supra* note 12, at 179-81. In turn, Mildred described her reaction to Frances's growing interest in Hand's suit in similarly stark terms: "I shall never forget how physically sick the thought of losing her made me feel," she confided in her diary. *Id.* at 96.

39 *Id.* at 92-94, 97-98. Frances also served on the Board of Trustees at her alma mater, Bryn Mawr. *Id.* at 90.

40 *Id.* at 78-79.

41 *Id.* at 101-07.

hurly burly of life at the bar, he began to make a name for himself as an intellectual through the "no-name" club and his writings.[42] His most important essay was a stinging attack on the Supreme Court's decision in *Lochner v. New York*.[43] His contempt for *Lochner's* expansive use of the Due Process Clause of the Fourteenth Amendment was later the most settled and controversial hallmark of his jurisprudence.

Hand also began following politics, even campaigning for a reform candidate for mayor of New York.[44] Unlike his more worldly cousin Gus, Hand did not follow his family's Democratic tradition. Rather, in 1898, he began allying himself with the Republican candidate for Governor, the ex-Rough Rider Theodore Roosevelt.[45] Hand's commitment to Roosevelt would deepen throughout Roosevelt's career, culminating in Hand's support of Roosevelt's third party presidential bid.[46]

Hand's route to the bench, however, was not simply a result of his political interests. Rather, it stemmed from his growing disenchantment with law practice, as his latest junior partnership remained more junior than partner, and from his friendship with Charles C. Burlingham. Burlingham was a successful, but by no means brilliantly intellectual, lawyer whom Hand met through his cousin Gus in 1903.[47] More politically influential than today seems warranted, Burlingham grew fonder of Hand during the 1903 mayoral campaign, where both opposed Tammany Hall's candidate in vain.[48] Four years later, Burlingham responded enthusiastically to Hand's request that Burlingham bring his extensive political influence to bear and wangle an appointment to the District Court bench for Hand.[49] Their first collaboration in 1907 failed, largely because the vacancy Hand and his competitors were seeking never existed; Congress did not create another position in the Southern District of New York as expected. Hand's domineering father-in-law, after vociferously opposing his son-in-law's plans to leave legal practice, provided key advice in assembling a coalition of backers, partisans and friends who finally secured Hand's appointment to

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42 *Id.* at 107-09.

43 Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495 (1908) (critiquing Lochner v. New York, 198 U.S. 45 (1905)). *See* GUNTHER, *supra* note 12, at 118-23.

44 *Id.* at 109-15.

45 *Id.* at 63-64.

46 *Id.* at 205-32.

47 *Id.* at 107-08.

48 *Id.* at 109-12.

49 *Id.* at 109, 123, 130.

the bench in 1909 by President William Howard Taft.[50] Fortunately for Hand's prospects, President Taft wanted nothing more than to be Chief Justice of the Supreme Court. Taft especially desired a vital and efficient judiciary, and thus supported a meritocratic approach to the appointment of lower court judges.[51] In appointing Learned Hand, Taft achieved his goal. In 1924, Calvin Coolidge appointed Hand to the Second Circuit, in another merit based appointment. Coolidge's conservative administration appointed Learned Hand despite his defection to the Progressive Party in 1912, which permanently alienated then Chief Justice Taft, who accordingly had opposed his promotion.[52]

Gunther excels in engagingly presenting the essentially undramatic public life, and the more complex private life, of Learned Hand. Gunther even brings secondary figures such as Thomas and Burlingham to life with a striking vividness. The author strips away the mask of certitude that the Judge wore, and shows Hand as a complex, insecure skeptic, motivated by equal parts of compassion and dubiety. In all of his forays into politics after his appointment to the District Court, and especially after his elevation to the Second Circuit in 1924, Hand, unlike his great friend Felix Frankfurter, yielded to his need to be involved in the great struggles of the day in the face of his conviction that his involvement in political controversies was improper.[53] While this means that Hand, unlike Frankfurter, sat out several key issues of the day (such as the *Sacco-Vanzetti* case),[54] he is not vulnerable to the charges of hypocrisy that devastate Frankfurter's reputation today.[55]

Regarding Frankfurter, it should be noted that Gunther's portrayal of the pushing, proselytizing little justice is oddly endearing. Unlike most accounts published in recent years, Gunther's enables

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50 *Id.* at 123-29.

51 *Id.* at 129.

52 *Id.* at 275-77.

53 *See, e.g.*, GUNTHER, *supra* note 12, at 386-88.

54 For Frankfurter's efforts to interest Hand in this case and Hand's rather insensitive treatment of Frankfurter, *see* GUNTHER, *supra* note 12, at 388-96. For examples of Hand wrestling with his desire to involve himself, see *id.* at 231-32 (declining to draft portions of Progressive campaign platform in 1912); *id.* at 344-45 (renouncing political engagement). He occasionally yielded to his activist impulses, although generally he came to regret it. *See id.* at 237-38 (regretting running for a state court appellate judgeship); *id.* at 540-41 (giving up political engagements after World War II). Hand publicly opposed McCarthyism, but agonized over the propriety of his doing so. *Id.* at 587-92.

55 *See, e.g.*, JAMES F. SIMON, THE ANTAGONISTS (1989); Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas, and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71 (1986).

the reader to see Frankfurter's unwavering commitment and integrity of his passionate political crusades. So often, this side of Frankfurter becomes obscured by the pedantry and sanctimoniousness which was typical of him, and marred so many of his relationships.[56] Gunther sees Frankfurter's flaws, but keeps his virtues in sight as well. The author's sympathetic portrayal of Frankfurter helps explain the typically blunt statement of William O. Douglas, Frankfurter's most reviled enemy, that "Felix belonged on this Court."[57]

Hand never received an appointment to the Supreme Court; that he was bypassed in favor of less prominent or well-respected men presents the obvious enigma regarding his professional life. Gunther handles this issue deftly, detailing Hand's various chances for promotion in a manner reminding the modern reader that Supreme Court nominations have long been political in nature. In fact, in the 1920s Hand was considered for a seat on the High Court several times. Nonetheless, in part due to Chief Justice Taft's influence, Hand was rejected for this esteemed position.[58] As Hand grew older, his chances to receive an appointment diminished. It was unfortunate for Hand that his last realistic chance for a seat on the Court brought him into competition with former justice and presidential candidate Charles Evans Hughes. When Chief Justice Taft resigned in 1930, Hand was fifty-eight, still of readily appointable age.[59] Based on several sources, Gunther asserts that President Herbert Hoover wavered between two options: he would either appoint Hughes to the center chair, or elevate an already sitting justice, Harlan Fiske Stone, to the center and fill the Associate Justice vacancy by nominating Hand.[60] Gunther suggests that Hoover offered the position to Hughes with the expectation that he would decline it, as Hughes's son was Solicitor General. With Hughes declining this nomination, and Hoover paying his political debt to Hughes, Hoover planned to nominate his actual choice, Stone.[61] Partisans of Hughes and Stone dispute this highly

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56 For examples of the more critical accounts of Frankfurter which predominate the academic and biographical portrayals of the last fifteen or so years, see BRUCE ALLEN MURPHY, THE BRANDEIS-FRANKFURTER CONNECTION (1982); SIMON, *supra* note 55; Urofsky, *supra* note 55.

57 *See* GUNTHER, *supra* note 12, at 389-92, 492-93; *see also* SIMON, INDEPENDENT JOURNEY, *supra* note 4, at 8-9.

58 GUNTHER, *supra* note 12, at 239.

59 *Id.* at 418.

60 *Id.* at 419 *et seq.*.

61 *Id.* at 420-21.

controversial account.[62] Nonetheless, Hughes received the appointment, and Hand's reaction of personal disappointment tends to establish that he, at any rate, believed he was in the running.[63]

Hand's final chance for a Supreme Court appointment came in 1942, when Franklin Roosevelt considered appointing him to the seat vacated by James F. Byrnes.[64] At the time, Hand was seventy years old, and Roosevelt had gone painfully on record in his Court-packing plan as distrusting the ability of judges over that age.[65] Beyond this, according to Attorney General Francis Biddle and Justice William O. Douglas, Frankfurter's incessant lobbying backfired; Roosevelt's inclination not to appoint Hand was strengthened by his irritation with Frankfurter.[66] More fundamentally, Hand's judicial views were simply inconsistent with Roosevelt's.[67] Hand's failure to obtain an appointment to the Supreme Court caused him bitter disappointment; characteristically, he castigated himself without mercy for his ambition.[68]

In Gunther's book, Hand's children receive scant attention. Additionally, Gunther's portrayal of the later years of Hand's marriage is set out in one chapter, "The Marriage and its Tensions," in a way that artificially isolates it from the stream of the narrative.[69] This is so that Gunther can get on with the main business of his

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62 *See, e.g.*, 2 MERLO S. PUSEY, CHARLES EVANS HUGHES 652-53 (1951).

63 *Id.* at 421-27 (describing the controversy surrounding contrasting accounts of Hughes' nomination and Hand's reaction).

64 *Id.* at 553-54.

65 *Id.* at 555-57.

66 *Id.* at 561-62. Gunther disputes William O. Douglas's account based upon its chronology in relation to the nomination process. Nevertheless, Gunther admits its depiction of Frankfurter is on point.

67 *Id.* at 562-64. Hand stated on this issue that Roosevelt "may well have found me alien; I fancy he did." *Id.* at 568.

68 *Id.* at 569-70.

69 *Id.* at 171-89. Gunther does, however, give more details of the marriage later in the book. *See id.* at 570-72. Gunther's account of Frances Hand's 30 year relationship with Louis Dow, a friend of both her and Learned's, tends to acquit her of her more than profound friendship with Dow. *Id.* at 187. In fact, the pair's relationship caused great scandal among their circle of friends and acquaintances, including Walter Lippmann, who wrote of Hand that the "first task of that man's biographer will be to enquire why he remained for so long on good terms with his wife's lover)," inclines toward acquitting her of more than profound friendship with Dow. *Id.* at 500. At the time Lippmann made this statement, his own friendship with Hand had soured, in part due to Lippmann's own marital woes. *Id.* As Gunther notes, however, the flood of endearments which typified the early Frances-Learned correspondence dried up while she sojourned abroad and spent time at the Hand summer home with Dow. These endearments between Learned and Frances resumed upon Dow's death in 1944. Even Gunther notes that the result of Dow's death was that Hand "found greater peace in his marriage." *Id.* at 570.

volume: an exploration of Hand's remarkable impact as the most respected lower court judge in American history.

LEARNED HAND: THE JUDGE

Gunther relies on the informal memoranda exchanged by the Second Circuit judges, as well as on Hand's private memoranda to show Hand's unique influence.[70] Hand's reputation for brilliance, won as a district court judge, did not alone give him preeminence. Rather, Hand's ability to reason persuasively within the common law context gave his opinions such great weight.[71] Gunther shows this in many fields, ranging from patent, to maritime law, and even in simple tort cases. [72]

It is in his portrayal of Hand as judge, however, that Gunther begins to go astray, both underestimating and overestimating Hand's contributions to the law. To begin with a startling omission, Gunther fails to even mention Hand's decision in *United States v. Carroll Towing*,[73] hailed by scholars as providing "an economic meaning of negligence" and thereby marking the beginning of the Law and Economics theoretical movement.[74] Moreover, the *Carroll Towing* opinion was not a freak, but a deliberate, conscious innovation on Hand's part, which he reaffirmed a year later, again offering the so-called "Learned Hand Formula" as an appropriate means of calculating when and whether to impose liability in tort.[75] Indeed, even retired Justice Lewis Powell, in listing Hand's contributions to the law in a Foreword to this very book, underscores the oddness of the omission, stating that "[f]irst year students of torts know Hand for" *Carroll Towing* and its importance to "the application of economic principles to legal analysis."[76]

In *Carroll Towing*, Hand defined a barge owner's duty:

> to provide against resulting injuries [a]s a function of three variables:
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> (1) The probability that she will break away;
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> (2) the gravity of the resulting injury, if she does;

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70 *Id.* at 291-95, 297-98.

71 *Id.* at 297-98.

72 *Id.* at 306 *et seq.*.

73 159 F.2d 169 (2d Cir. 1947).

74 *See* Calibresi & Hirschoff, *Toward a Test of Strict Liability in Torts*, 81 YALE L.J. 1055, 1060-61 (1972); Richard A. Posner, *Learned Hand Formula for Determining Liability in* TORT LAW CASES AND ECONOMICS, ch. 1 (1982); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD., 29, 32-33 (1972); *see also* United States Fidelity & Guarantee Co. v. Jadranska Slobodn Plovidba, 683 F.2d 1022 (7th Cir. 1982) (Posner, J.).

75 Moisan v. Loftus, 178 F.2d 148, 149 (2d Cir. 1949) (Hand, C.J.).

76 Lewis F. Powell, *Foreword* in GUNTHER, *supra* note 12, at x.

> (3) the burden of adequate precautions
> . . . .if the probability be called P; the injury L; and the burden B, liability depends upon whether B is less than L multiplied by P.[77]

Thus for Hand, the tort-feasor acts at his or her peril when the burden is less than the probability and the magnitude of the likely injury multiplied.[78]

The omission of *Carroll Towing* and Hand's later restatement of its rule is especially unfortunate, as Hand's relationship to the Law and Economics movement stands in need of exploration from a biographical standpoint. Not only did *Carroll Towing* foreshadow the arguments advanced as a tool for analysis in negligence and other civil cases, but, in *United States v. Dennis*, Hand even anticipates Judge Richard Posner in the application of economic principles to legal analysis of non-financial interests.[79] In leading to the formation of an entire school of jurisprudential theory, *Carroll Towing* has a strong claim to be considered Hand's most significant contribution to jurisprudential theory.

Compounding this startling omission is one outright and obvious misstatement of the law of free speech, a lapse which is extremely disconcerting coming from a constitutional scholar of Gunther's renown. In praising Hand's contribution to the jurisprudence of free speech, Gunther states that "[b]y the late 1960s, the Supreme Court announced its most speech protective standard ever. And that standard is essentially an embracing of Hand's *Masses* approach."[80] This statement is at best a half-truth.

In *Masses Publishing Co v. Patten*,[81] Hand construed the Espionage Act, consistent with his reading of the First Amendment, to

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77 159 F.2d at 173.

78 *Id.*

79 183 F.2d 201 (2d Cir. 1950). Hand, as seen *infra*, used economic analysis to determine the parameters of constitutional protection accorded to speech; Posner suggests its applicability to the substantive criminal law. Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

80 Gunther, *supra* note 12 at 152. Oddly, Gunther does not identify the case which "embraced" Hand's approach in *Masses*. His footnote to the quoted statement, footnote 200 to page 152, merely refers the reader "for my fuller analyses of the *Masses* case" to his 1975 article. Similarly, when Gunther states that Hand's was "an analysis that, decades later, became the law of the land," he does so without providing any support or elaboration. This failure to explain how Hand's First Amendment jurisprudence has allegedly become the law is especially disconcerting as, as is shown in the text, the statements cannot be accepted as accurate.

81 244 F. 535 (S.D.N.Y. 1917), *rev'd.* 246 F. 24 (2d Cir. 1917) (holding that left-wing magazine's opposition to First World War and conscription did not violate Espionage Act, as magazine fell short of advocating violation of law).

require the "direct incitement" or "direct advocacy" of unlawful conduct prior to permitting suppression of a speaker by the government.[82] Should such direct advocacy be established, no likelihood of an actual violation of the law was necessary; even if the speaker stood alone in the rain vainly shouting, he or she could be prosecuted.[83] The Supreme Court did not adopt this test in the late 1960s, or indeed ever. In *Brandenburg v. Ohio*,[84] in order to justify suppression, the Court required, *in addition* to direct advocacy of unlawful conduct by a speaker, that the advocacy take place in a context such that an "imminent" danger of unlawful conduct was created.[85] This new test fused the most speech protective aspects of Hand's approach to a strict reading of the clear and present danger test advocated by Justices Oliver Wendell Holmes and Louis D. Brandeis. That test, even in its earliest incarnation, required as a prerequisite to suppression that the utterance of the speech *first* create a significant risk (a "clear and present danger") of an evil's resulting; *second*, that evil must be one Congress has the right to act to prevent; *third* (and finally), the actor must have given tongue to the speech *with the specific intent of causing that very evil*.[86]

In recent years, it has become increasingly fashionable to exalt Hand's contribution to free speech jurisprudence. This trend

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[82] *Id.* For a detailed account of Hand's development of his own First Amendment test through a construction of the Espionage Act, as well as an account of the correspondence between Hand and Holmes suggesting that Holmes's conversion may have partially been caused by Hand's advocacy of a more libertarian test, see Gunther, *supra* note 11. This same viewpoint is expounded in GUNTHER, *supra* note 12, at 151-70. Gunther's conclusions are fully endorsed by David Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1210 (1983).

[83] As Hand later wrote to a former clerk, "I would make the purpose of the utterer the test of his constitutional protection. Did he seek to bring about a violation of existing law? If he did, I see no reason why the constitution should protect him, however remote the chances of his success." GUNTHER, *supra* note 12, at 604-05. Even Gunther admits elsewhere in his book that the *Masses* test forms only "part of the law of the land," plainly referring to the *Brandenburg* test. *Id.* at 170.

[84] 395 U.S. 444 (1969).

[85] *Id.* at 446-48.

[86] See Wirenius, *The Road to Brandenburg: A Look at the Evolving Understanding of the First Amendment*, 43 DRAKE L. REV. 1 (1994) (explicating Schenck v. United States, 249 U.S. 47 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204, 210 (1919) (affirming convictions of anti-war protesters under Espionage Act on ground that such conduct presented a "clear and present danger" that unlawful conduct would occur)).

This forthcoming article details Holmes's gradual evolution from a common law approach to interpreting the First Amendment to a recognition that the Amendment represents a radical shift from the common law modes of reasoning in which Holmes and Hand excelled. Many of the Holmes-Hand comparisons in this book review are set out more fully in this article.

dates back to Gunther's own 1975 article setting out Hand's efforts to persuade Holmes to adopt the bright-line rule in *Masses*.[87] Holmes, as Gunther recounts, corresponded with Hand regarding the proper level of protection to be accorded to anti-government speech. Hand urged Holmes to adopt a more intent-based approach, leading Holmes to reply that "I don't see how you differ from the test as stated by me."[88] Gunther, in his 1975 article, referred to this comment as proof of "Holmes' lack of awareness of distinctions quite plain to more concerned contemporary observers."[89] He maintains this position in the biography.[90] However, Holmes's perplexity seems more natural in view of the often-overlooked intent requirement in his own test,[91] as is patently clear from the context of the letter reprinted in Gunther's article. Just prior to the comment allegedly showing Holmes's obliviousness, he writes concerning intent, backing away partially from his opinion in *Debs v. United States* and concluding somewhat defensively "[e]ven if absence of intent might not be a defence I suppose that the presence of it might be material."[92]

Bearing the intent requirement of *Debs* in mind, it is easier to understand Holmes's confusion; their differences are in fact quite narrow. This is particularly true in light of Hand's statement that "I haven't any doubt that Debs was guilty under any rule conceivably applicable,"[93] a comment Gunther in his article writes off as "an

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87 *See* GUNTHER, *supra* note 12, at 161-67; Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment*, 61 U. COLO. L. REV. 1 (1990); Rabban, *supra* note 81.

88 Gunther reprints this letter in full in his article. *See* Gunther, *supra* note 11, at 759-60.

89 *Id.* at 741.

90 GUNTHER, *supra* note 12, at 166-67.

91 In *Debs*, Holmes explicitly held that the validity of the conviction therein upheld turned upon the existence of intent on the defendant's part "to obstruct the recruiting service" through his speech, approvingly noting that the lower court had instructed the jury that it could not convict absent a finding of specific intent. 249 U.S. at 215-16. As Gunther relies on the "tendency" prong of *Schenck* alone, and misses entirely the intent requirement of *Debs*, he is able to posit, as does Rabban, that Holmes moved significantly forward in his libertarian dissents, but that Hand's test was far more speech protective. Gunther, *supra* note 11, at 734-36; Rabban, *supra* note 81, at 1210. Gunther concludes that "in its origin clear and present danger reflected neither special sensitivity to free speech values nor special concern for tailoring doctrine to implement those values." Gunther, *supra* note 11, at 736. *See also* G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391, 402-03 (1992) (dividing Holmes's jurisprudence between his "orthodox" pre-*Abrams* and his subsequent libertarian jurisprudence).

92 This letter (Holmes-Hand) is fully reprinted in Gunther, *supra* note 11, at 759.

93 Gunther includes a reprint of this letter (Hand-Holmes) in Gunther, *supra* note 11, at 758-59.

effort to seem to agree with the result while trying to persuade the master" as "it differs from the tenor of his remarks to others."[94] Unfortunately, Gunther does not keep his promise made in the 1975 article to set out these "remarks to others," making it impossible to evaluate Hand's real opinion on the merits of Debs's conviction. However, approval of Debs's conviction fits well into Hand's test, if one accepts Holmes's finding for the Court that there was sufficient evidence at trial to support a finding that the "intent of the more general utterances was to encourage those present to obstruct the recruiting services."[95] More fundamentally, one can readily envision at least one context in which Holmes, but not Hand, would protect speech: when such speech was a direct incitement to unlawful conduct but did not create a "clear and present danger" of such conduct.

Hand did not move away, as many think, from his "advanced" *Masses* opinion in writing the speech repressive opinion in *United States v. Dennis*.[96] Gunther explains the *Dennis* opinion as based upon Hand's obedience to binding precedent in his position as a lower court judge.[97] There are two flaws with such an analysis. First, it does not explain the innovative way in which Hand interpreted "clear and present danger" in *Dennis*. In seeking a constitutional paradigm for the protection of speech, Hand looked to the common law of torts. In *Dennis*, Hand upheld the convictions of several defendants under the Smith Act for "'willfully and knowingly' conspiring to organize the Communist Party of the United States as a group to 'teach and advocate the overthrow and destruction' of the government 'by force and violence.'"[98] Hand's opinion gave as the constitutional test the question "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[99]

This formulation mirrored Hand's economic formulation of tort liability, omitted by Gunther from this biography, in *United States v. Carroll Towing Co.*[100] As in *Carroll Towing*, Hand ruled that a speaker speaks at his or her peril when the invasion of free speech (the burden) is less than the magnitude of the injury combined (multiplied?) with its (im)probability. The identic nature of

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94 *Id.* at 739.

95 Debs v. United States, 249 U.S. 211, 212-13 (1919).

96 183 F.2d 201 (2d Cir. 1950).

97 GUNTHER, *supra* note 12, at 603-04.

98 *Dennis*, 183 F.2d at 205.

99 *Id.*

100 159 F.2d 169 (2d Cir. 1947).

the tests should not be lost because in *Dennis*, Hand describes the probability factor negatively—rather than multiplying by probability he "discounts by *im*probability," which is, of course, the same thing. Hand treated speech as a common law tort situation, not seeing a difference between the two modes of reasoning, or any need for a special level of protection.

Moreover, this approach is *more*, not *less* protective of speech than Hand's approach in *Masses*, which permits the imposition of liability regardless of any risk of harm (i.e., violation of the law). Hand was not an early liberal who gradually became a conservative, as the critics Gunther seeks to answer would depict Hand, or a liberal bound by precedent, as Gunther depicts Hand. Rather, Hand was, as he himself stated, in "dissent from the whole approach to the problem of Free Speech which the Supreme Court has adopted during the last thirty-five or forty years."[101] Preferring his bright-line (but restrictive) view in *Masses*, Hand sought to limit the impact of clear and present danger by reducing its scope to the level of protection accorded to a garden-variety tort.

In fairness, it should be noted that Hand saw his *Masses* opinion as *protective* of free speech, and, in his correspondence with Holmes and with Zechariah Chaffee, Hand demonstrated his concern with *expanding* the class of protected speech, so long as advocacy of unlawful conduct stays outside of the circle of protection.[102] Holmes, more willing than Hand to protect "opinions that we loathe," sought to include it within the circle from the beginning.

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101 GUNTHER, *supra* note 12, at 604.

102 *Id.* at 161-70. Hand also insisted on a context-based definition of obscenity defined by what would be prurient to the average citizen, instead of the previously accepted common law understanding of obscenity permitting censorship based on isolated passages. Hand attempted to scrap this archaic test, which permitted censorship of any materials, which could, in the eyes of the court, deprave the imaginations of the most vulnerable classes of society. His efforts culminated in 1934, when the Second Circuit, largely due to Hand's tireless efforts, affirmed a lower court finding that James Joyce's *Ulysses* was not obscene. United States v. One Book Entitled Ulysses, 72 F.2d 705, 708 (2d Cir. 1934) (rejecting common law definition of obscenity). *See also* GUNTHER, *supra* note 12, at 328-42 (tracing Hand's early efforts to reform obscenity law and delineating his pivotal role in the *Ulysses* case).

Hand certainly emerges with "liberal laurels" in the development of the obscenity laws. The Supreme Court did not go as far as Hand in reforming obscenity law until Roth v. United States, 354 U.S. 476 (1957), as Gunther correctly notes. GUNTHER, *supra* note 12, at 342. However, as with his *Masses* opinion, Hand's obscenity opinions were not based on the Constitution's limitations on state or federal power, but rather on constructing existing law in harmony with the values of the First Amendment. For Hand, the right of the state to proscribe obscenity appears not to have been in doubt; he wanted a narrower definition to protect meritorious literature from the Anthony Comstocks of his day, and every day. *Id.* at 331-32, 337-38.

Nonetheless, Holmes's progress toward a high *quantum* of protection was slower than Hand's.[103] Only in *Abrams* did Holmes and Brandeis give real teeth to the clear and present danger test. Once Holmes and Brandeis took this step, their test was, in fact, far more protective than Hand's test, despite his persistent clinging to it.

Hand's constitutional and political views lead Gunther to categorize him as a "liberal" although he notes Hand's own feeling that he was "a conservative among liberals and a liberal among conservatives."[104] In fact, despite his support of the Progressive Party and of tolerance as a fundamental virtue, Hand's record on civil liberties issues presents an extremely mixed bag. Gunther portrays Hand's extreme reluctance to overturn laws on the basis of a judicial finding of unconstitutionality as an outgrowth of Hand's belief in democracy and corresponding unwillingness to vest "revisory" power, as Hand himself put it, in "those nine gents in Washington."[105] Thus, despite his abhorrence of "Know-Nothingism," Hand opposed "liberal" substantive due process decisions such as *Pierce v. Society of Sisters*[106] and *Meyer v. Nebraska*.[107] Rather oddly, Hand did not see the First Amendment values implicit in these free association decisions, and viewed them as the sort of judicial freebooting from the left that he roundly condemned from the right.[108]

Toward the end of Hand's life, in *The Bill of Rights*, his controversial attack on the Warren Court,[109] Hand would take this position to a length that even Gunther regards as "outside the mainstream of modern legal thought."[110] In *The Bill of Rights*, Hand argued that the judiciary could not enforce the first nine amendments to the Constitution due to their vagueness.[111] He described these provisions of the Constitution as "admonitory or hortatory, not definite enough to be guides on concrete occasions."[112] Hand even declared that no scope in the Constitution existed for

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103 See *Abrams v. United States*, 250 U.S. 616, 624 (Holmes, J., dissenting).

104 GUNTHER, *supra* note 12, at 352.

105 *Id.* at 378.

106 268 U.S. 652 (1925) (invalidating state law forbidding private school education by requiring all children within state to attend public school).

107 262 U.S. 390, 403 (1923) (invalidating state statute forbidding the teaching of any foreign language below the high school level).

108 GUNTHER, *supra* note 12, at 378-80.

109 LEARNED HAND, THE BILL OF RIGHTS (1958). Gunther himself describes this book as "an attack both on the Warren Court's general jurisprudence and on some of its specific rulings." GUNTHER, *supra* note 12, at 655.

110 *Id.* at 656.

111 *Id.* at 655-56

112 *Id.* at 656; HAND, *supra* note 108, at 31, 34, 42.

heightened review of statutes impacting upon freedom of expression. As a matter of constitutional interpretation, Hand stated, such statutes should be subject only to extremely deferential review to ascertain their rationality.[113] On this last point, however, Hand was prepared to give way, as a matter of practical utility, and permit judicial enforcement.[114]

Without fully revisiting the decades-old *Bill of Rights* debate in a book review of this scope, it is ironic that Hand, an expert in parsing often abstruse statutes, could cheerfully render so many sections of the Bill of Rights wholly without meaning. Just like the Supreme Court in the *Slaughter House Cases*,[115] which eliminated the Privileges and Immunities Clause of the Fourteenth Amendment by construing it *in pari materia* with that of the Fifth Amendment, Hand in *The Bill of Rights* overlooked the most basic rule of construing any legal instrument: each provision is to be construed so as to accord it *some* meaning. Although some eminent scholars have suggested a similar approach to the Ninth Amendment,[116] the deliberate nullification of portions of the very instrument that a court engages to construe must surely present a danger signal to the judge.

Moreover, the justification for the extraordinary self-abnegation on the part of the Judiciary urged by Hand, the alleged lack of specificity of the Constitutional provisions at issue, rendering even an attempt an obstruction to the Judiciary's vital "albeit less glamorous duties, especially the interpretation of statutes"[117] is less than compelling. This is especially true in view of the lack of specificity of many other legal concepts which the courts deem themselves able to interpret, such as the "reasonable person" standard, the subject of uproarious satire.[118] Likewise, the "originality" requirement for copyright protection is open-ended, as are the "Writings" protected thereunder according to the Constitution. So too, are

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113 In view of the specificity of the First Amendment, as Gunther points out, the textual difficulties which formed the basis of Hand's aversion to due process analysis did not exist, leaving Hand with essentially a policy preference. GUNTHER, *supra* note 12, at 657-58.

114 *Id.* at 657-58. Similarly, Hand deemed the exercise of judicial review of statutes for unconstitutionality as unwarranted by the text of the Constitution. As a practical matter though, Hand was willing to permit judicial review as needed to preserve coherence in our federal system. *Id.* at 655-56; HAND, *supra* note 108, at 29.

115 16 Wall. 36 (1873).

116 *Cf.* C.L. BLACK, *On Reading and Using the Ninth Amendment, in* THE HUMANE IMAGINATION 186, 186-201 (1986).

117 GUNTHER, *supra* note 12, at 658.

118 A.P. HERBERT, UNCOMMON LAW 2-4 (1959).

statutes based upon "moral turpitude." Yet Hand felt himself competent to give meaning to each of these terms, and did so as a judge, not a legislator.[119]

Hand would limit even the seemingly specific provisions of the Bill of Rights involving the procedural rights of criminal defendants against self-incrimination and confrontation of witnesses to "their historic meaning." [120] With this, Hand elevates seventeenth century practice over the textual language of the Constitution.

It is difficult to evaluate this position dispassionately, as Gunther has attempted. The author points to Hand's life-long opposition to substantive due process analysis and his refusal to opportunistically avail "his" side (the liberal) of advantages he would deny the conservatives.[121] Relatedly, Hand's specific condemnation of *Brown v. Board of Education* is explained as a "delayed surrender" to Felix Frankfurter's interpretation of the case. Gunther details letters between Frankfurter and Hand, in which Frankfurter described *Brown* as turning not on a judicial finding of the impropriety of discrimination by race, which Gunther believes Hand would have supported, but on a special value assigned by the Court to education.[122]

Yet these explanations are, in the end, unconvincing. Substantive due process in the *Lochner* sense of judicial importation of personal policy preferences stands on a very different footing than enforcement of the provisions of the Bill of Rights against the states through the Fourteenth Amendment. Whether one accepts or rejects the variants of "incorporation" theory, the provisions of the Bill of Rights are not vague, unratified theories held only by a segment of the population, as were "Mr. Herbert Spencer's *Social Statics*" so witheringly rejected by Holmes in his *Lochner* dissent.[123] Rather, the Bill of Rights was ratified with the rest of the Constitution—indeed its omission nearly *prevented* ratification of the Consti-

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119 Hand construed "moral turpitude" or "good moral character" for purposes of naturalization law in the following cases: United States *ex rel.* Iorio v. Day, 34 F.2d 920, 921 (2d Cir. 1929); Repouille v. United States, 165 F.2d 152, 153 (2d Cir. 1947); Schmidt v. United States, 177 F.2d 450, 451 (2d Cir. 1949). *See generally* GUNTHER, *supra* note 12, at 658 (discussing these cases). Hand construed "originality" for purposes of Copyright protection in Hein v. Harris, 175 F. 875 (S.D.N.Y. 1910) discussed by GUNTHER *supra* note 12, at 317-18. Gunther also discusses Hand's ability to interpret the constitutional meaning of "writings" in Reiss v. National Quotation Bureau, 276 F. 717, 718 (S.D.N.Y. 1921). *Id.* at 319.

120 *Id.* at 658.

121 *Id.* at 664-66.

122 *Id.* at 666-71.

123 Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

tution. Hand offers no compelling reason for treating these solemn acts of the American people which made possible the formation of the government he served so well like the economic theories rightfully rejected by anti-*Lochner* liberals.

Moreover, had Hand rejected the Fourteenth Amendment alone, or rather all variants of incorporation doctrine, his theory would at least have made sense. But in denying the judiciary power to enforce the Bill of Rights against the *federal* government as well as the states, he foreswore coherence for extremism.

If the federal government cannot be stopped from violating its constitution, then what good *is* that constitution? Hand argues that the power of judicial review should be limited to, as Gunther summarizes, "court enforcement of the boundaries of the powers of each organ of government, those pertaining to state and national power in the federal system, rather than those pertaining to individual rights."[124] However, these provisions are no more clear or specific than the Bill of Rights, and are expressed in the same broad terms.[125] In view of this, Hand's suggested judicial deference is in fact tantamount to arrogance, choosing, by refusing to enforce them, which provisions may be flouted at will by the government of the day. These are problems left untouched by Hand, whose reading of the Constitution in his last significant work seems more like an account of Parliamentary supremacy than one of the American tripartite system.

On criminal procedure issues, Hand vacillated. Gunther is able to point to eloquent statements by Hand protecting Fourth Amendment rights and condemning coerced confessions.[126] On the other hand, a passionate pair of letters he sent his friend Frankfurter in 1923 bespeak a harshness and indeed a *brio* in the face of the prospect of injustice at odds with the rest of the portrait Gunther paints. In 1923, Hand wrote Frankfurter that:

> [o]ur dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that ob-

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124 GUNTHER, *supra* note 12, at 656.

125 For example, Article II simply states that the "executive power shall be vested in a President of the United States" without specifying what that power shall be. Although Article II gives instances of that power, it is never described in exclusive terms, nor are the instances given terribly specific. Similarly, the parameters of "the judicial power" to be exercised only by judges as defined by Article III is far from clear, as reflected by the creation of so-called "Article II courts." *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 51-61 (2d ed. 1988).

126 GUNTHER, *supra* note 12, at 597.

structs, delays and defeats the prosecution of crime.[127]

Hand elaborated in another letter:

> Like you, I vary somewhat in my views about the procedural protections accorded defendants. Occasionally the show goes wrong. On the whole when it does it is because the public is in a hanging mood and I doubt in those cases the efficacy of the safeguards you mention. Perhaps I underestimate them. In ordinary times you will agree that American criminal jurisprudence has been fettered by the web of red tape which has always surrounded it. We must in some way learn to deal more directly and effectively with the commission of crime if we are to check the lawlessness which is our curse. I had rather take my chances of occasional judicial lynchings than hamstring the course of justice, though I admit it is a matter of degree.[128]

Apparently, the "degree" Hand speaks of is the "third degree" for the unfortunate losers of this judicial lynching sweepstakes. This odd mixture of compassion and callousness, of sensitivity and harshness, makes Hand so difficult a figure to assess. With due respect for what Gunther has accomplished in this readable, informative book, the almost roseate picture of the judge that he paints fails to come to grips with this complex, ambiguous jurist's record, even as it sets that record out.

Conclusion

Near the end of his book, in describing the furor that surrounded *The Bill of Rights*, Gunther asks "Had Hand turned against liberal values? Had Hand turned conservative?"[129] The answer Gunther gives is that he had not, based upon his belief in judicial restraint. That answer may be correct by the standards of Hand's relative youth perhaps, when the terms "liberal" and "conservative" related more to one's views of the legitimacy of economic regulation than to the issues of personal liberty.[130] Yet even during the *Lochner* era there existed liberals in the modern sense of the word, and Hand was never among them, although his personal and political preferences were libertarian. In truth, although Hand remained consistent, the meanings affixed to the labels changed.

In today's usage of the word, however, Hand was, as Douglas described Frankfurter, "a brilliant advocate of his conservative phi-

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127 *Id.* at 391.

128 *Id.*

129 *Id.* at 664.

130 *See* William F. Swindler, *The Court and the Constitution in the Twentieth Century: The New Legality: 1932-1968* (1970) at vii-viii; Urofsky, *supra* note 55, at 96.

losophy".[131] That does not make this brilliant, workmanlike judge, devoted to a philosophy of skepticism, yet riven with compassion for those whose fates he decided, less admirable.[132] It does, however make one question Gunther's insistence on burnishing Hand's tarnished liberal halo. Perhaps the answer is contained in Gunther's Preface, which he concludes by observing that, although he has tried to portray Hand "warts and all," "he remains my idol still."[133] Gunther's admiration for his subject may have led him to cling to Hand's reputation for liberalism, to overestimate the degree to which Hand stood for values which Gunther himself holds.

One dimension, however, of Gunther's portrayal that rings true is the passion with which Hand approached his job, and the lack of detachment he felt from his fellow citizens. Gunther repeatedly describes Hand as tempted to join progressive political causes out of fellow feeling with the outsiders in society. Hand agonized over each appeal to that compassion and sometimes spoke out, despite his belief that as a judge it was improper for him to enter the controversies of the day. Where detachment came easily for Holmes, Hand was no Olympian. No stranger, he was, instead, a brother.[134]

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131 SIMON, INDEPENDENT JOURNEY, *supra* note 4, at 8-9.

132 Gunther gives repeated examples of Hand's willingness to leave his cushioned social milieu to meet with, defend, and to befriend other social outsiders. For example, Hand was outspoken in his opposition to anti-Semitism. GUNTHER, *supra* note 12, at 115-18. Hand also became personally engaged in the plight of immigrants brought before him in deportation cases. *Id.* at 303-04.

133 *Id.* at xviii.

134 *Id.* at 345 (detailing Holmes's "Olympian" detachment). *See generally* BAKER, *supra* note 3; WHITE, *supra* note 3, at 478-79. The contrast between "strangers and brothers" is borrowed from C.P. SNOW, STRANGERS AND BROTHERS (1940-1970, omnibus ed. 1972), an eleven volume novel sequence exploring, among many other themes, intimacy and alienation.